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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 515

HEART OF ATLANTA MOTEL, INC., APPELLANT

v.

THE UNITED STATES OF AMERICA AND ROBERT F. KENNEDY, AS THE ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the three-judge district court (R. 74) is reported at 231 F. Supp. 393.

JURISDICTION

The order of the district court granting a permanent injunction (R. 78–80) was entered on July 23, 1964. Notice of appeal to this Court was filed on July 30, 1964 (R. 81). Jurisdiction is conferred on this Court by 28 U.S.C. 1253, and by section 206(b) of the Civil Rights Act of 1964, 78 Stat. 245.

Although probable jurisdiction has not yet been formally noted, the case is obviously one of national importance and warrants full consideration. As the Court is aware, the parties have agreed, in order to expedite a hearing of the cause, to file full briefs in advance of the notation of jurisdiction.

QUESTIONS PRESENTED

1. Whether Sections 201(a), (b)(1), and (c)(1) of the Civil Rights Act of 1964, which prohibit racial discrimination in any inn, motel, hotel, or other establishment which provides lodging to transient guests, constitute a lawful exercise of the power of Congress to regulate commerce among the several States.

2. Whether the statute deprives the appellant corporation of rights guaranteed by the Fifth and Thirteenth Amendments to the Constitution.

STATUTE INVOLVED

Sections 201 and 206 of Title II of the Civil Rights Act of 1964, 78 Stat. 243, 245, provide in pertinent part as follows:

> SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimi-

nation or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

* * * * *

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); * * *

* * * * *

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such a court

> a request that a court of three judges be convened to hear and determine the case. * * * An appeal from the final judgment of such court will lie to the Supreme Court.

STATEMENT

On July 2, 1964, the President of the United States signed into law the Civil Rights Act of 1964, P.L. 88–352, 78 Stat. 241. On the same day appellant, Heart of Atlanta Motel, Inc., filed a complaint in the United States District Court for the Northern District of Georgia, attacking the constitutionality of Title II of the Act and seeking damages, declaratory relief, and an injunction against the United States of America and Robert F. Kennedy, then the Attorney General of the United States (R. 5), on the ground of injuries to appellant which allegedly would result from enforcement of the Act.

The facts stipulated before the district court (R. 17, 32) show that appellant corporation owns and operates a motel in Atlanta, Georgia, with 216 rooms for lease to transient guests. Approximately 75 percent of its guests come from outside Georgia, and appellant accepts convention trade from outside the State. Besides maintaining over fifty billboards and highway signs advertising the motel on highways in Georgia, appellant solicits patronage for the motel from outside the State through various national advertising media, including magazines having a national circulation.

The complaint as amended[1] alleged that sections 201(a), (b)(1), and (c)(1) of the 1964 Act, which

[1] An amendment to the complaint was filed on July 15, 1964 (R. 13).

prohibit racial discrimination in enumerated "place[s] of public accommodation", including hotels and motels, exceeded the power of Congress to regulate commerce among the several States (R. 9), deprived appellant of liberty, freedom of contract, and property without due process of law, took its property without just compensation (R. 8, 14), and subjected it to involuntary servitude contrary to the Thirteenth Amendment (R. 13). The complaint stated further that appellant "has never rented sleeping accommodations to members of the negro race" and "has refused and intends to refuse to rent sleeping accommodations to persons desiring said accommodations, for several different reasons, one of which is based on the ground of race." (R. 6, 7). This policy is followed "because plaintiff corporation determined that such exclusion was in the best interest of plaintiff's business and was necessary to protect plaintiff's property, trade, profits and reputation," which would, if the Act were enforced, be subjected to "irreparable damages" by the loss of "a large percentage of its customers, income and good will * * *" (R. 7, 8, 10).

On July 10, 1964, the government answered the complaint (R. 21–24) and counterclaimed (R. 22), asserting the constitutionality of the Act and its application to the appellant. The counterclaim alleged that the motel "has refused, is refusing and has announced that, unless enjoined by this Court, it will continue to pursue its policy of refusing accommodations * * * to Negroes on account of their race or color" (R. 22); and that these "acts and practices" constitute a "pattern and practice of resistance" (R.

22) to the rights secured by Title II of the 1964 Act, thus entitling the Attorney General to institute a civil action (and hence to file a counterclaim) to enforce the Act. See Section 206(a), Civil Rights Act of 1964.[2] The counterclaim sought a preliminary and permanent injunction restraining the appellant from continuing to violate the Act (R. 18, 23–24).

A district court of three judges[3] was convened (R. 2) both because the complaint sought an injunction restraining enforcement of an Act of Congress on the ground of "repugnance to the Constitution of the United States" (28 U.S.C. 2282) (R. 75) and because the Attorney General's counterclaim alleged a "pattern and practice of resistance" to the rights granted by Title II of the 1964 Act (R. 22) and the Attorney General had certified that the case was one of "general public importance" (R. 20).[4] Sections 206 (a),

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[2] A second counterclaim, making similar allegations of violation of the statute with respect to a restaurant located within the motel (R. 23), was dismissed by the Court, on motion of the Attorney General (R. 27–28), on the ground that the restaurant, operated by a lessee of the appellant (R. 16), had been complying with and intended to continue to comply with the law (R. 16).

[3] Chief Judge Tuttle of the Court of Appeals for the Fifth Circuit, and District Judges Hooper and Morgan of the Northern District of Georgia.

[4] Violation of the law by a single business entity constitutes a "pattern or practice" if it is pursuant to a continuing policy of the business. The language of Section 206(a) allows suit wherever "any person * * * is engaged in a pattern or practice of resistance" to the Act. The legislative history is equally explicit. Senator Humphrey, leading majority proponent of the bill, stated (110 Cong. Rec. 13776 (daily ed.)):

"Such a pattern or practice would be present only when the denial of rights consists of something more than an isolated,

(b), Civil Rights Act of 1964. On July 17, 1964, the conflicting motions for preliminary injunctions were heard by the court. The government offered evidence that appellant had refused, after passage of the Act, to accommodate Negro guests because of their race and color (R. 33–41). Appellant presented no evidence (R. 41), resting on the pleadings and the stipulation of facts.

The district court rendered its unanimous decision on July 22, 1964, sustaining the validity of sections 201(a), (b)(1), and (c)(1) (R. 74–78), and entering a permanent injunction restraining appellant from continuing to violate the Act (R. 78–80).[5] Quoting *United States* v. *Darby*, 312 U.S. 100, 118, the court noted that the power of Congress "extends to those activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate means to * * * the exercise of the granted power of

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sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice * * * *if a company repeatedly and regularly engaged in acts prohibited by the statute.*" (Emphasis added.)

Congressman Celler, Chairman of the House Judiciary Committee and principal spokesman for the bill in the House made clear the same intent (110 Cong. Rec. 15363 (daily ed.)): "A pattern or practice of resistance would exist * * * where a single company regularly refused to treat Negroes without discrimination." Thus a "pattern or practice" of discrimination was established in this case, where the record shows an announced policy of the appellant not to comply with the statute and not to provide lodging to any Negro in the future unless compelled to do so by court order.

[5] The court noted that the parties had conceded that the matter might be treated as a proceeding on an application for a permanent (as well as a preliminary) injunction (R. 73, 75).

Congress to regulate interstate commerce," and that it had, not two weeks before, held * that appellant's operations so affected interstate commerce as to render it subject to the Sherman Antitrust Act. (R. 77–78.) Similarly, hotel operations were, the court observed, subject to the National Labor Relations Act. In the light of those precedents, the court concluded that Congress had ample power to enact Title II of the Civil Rights Act of 1964. It therefore entered an order restraining appellant from (R. 80):

> (a) refusing to accept Negroes as guests in the motel by reason of their race or color;
>
> (b) making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

The court stayed the injunction until August 11, 1964, to allow appellant an opportunity to prepare its record for appeal and, "if so advised," to seek a stay (R. 79, 80). A stay was sought in this Court and denied by Mr. Justice Black on August 10, 1964.

SUMMARY OF ARGUMENT

Section 201(a) of the Civil Rights Act of 1964 requires "any place of public accommodation" whose operations affect commerce to serve all persons "without discrimination or segregation on the ground of race, color, religion, or national origin". Section

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* *Marriott Hotels of Atlanta, Inc.* v. *Heart of Atlanta Motel, Inc.*, C.A. No. 8832 (N.D. Ga., July 10, 1964).

201(b) provides (with a single exception not relevant here) that any hotel or motel which provides lodging to transient guests is a "place of public accommodation," and Section 201(c) states that the operations of all such establishments are deemed to affect commerce. Restaurants and gasoline stations are also "place[s] of public accommodation" within the meaning of Section 201 (a) and (b), but they are subject to the statute only if a substantial portion of the food or products they sell "has moved in commerce" (or if they serve interstate travelers). Theaters and other places exhibiting theatrical or athletic events are covered if the films or persons providing entertainment move in interstate commerce. The statute, if constitutional, is admittedly applicable to appellant's motel. The sole question here is the constitutionality of the statute.

1. Under established principles, the commerce power is amply broad enough to sustain both the general prohibition of discrimination in places of public accommodation and its particular application to hotels and motels. Congress has power to promote and encourage interstate commerce and travel by prohibiting activities that interfere with that commerce, where the interference results from local activities engaged in by large numbers of persons even though each enterprise alone is relatively small. See *Labor Board* v. *Reliance Fuel Corp.*, 371 U.S. 224. This is the situation with regard to racial discrimination in places of public accommodation. Having before it evidence that the commerce of whole sections of the country was being impeded by racial discrimination and disrupted by the resulting boycotts, picketing,

mass demonstrations and the other weapons of economic and social disputes, Congress attacked the problem on a broad front. In implementing its objective, however, it followed established lines of authority. It regulated restaurants and gas stations which obtain a significant portion of the goods they sell from other States, on two grounds. *First,* racial disputes, like labor disputes, discourage patronage and interfere with business; they thereby interfere with and reduce purchases-for-resale from other States. *Second,* the refusal of such retail establishments to serve Negro consumers, like a group boycott forbidden by the Sherman Act, imposes a wholly arbitrary limitation on the market by eliminating an important source of potential demand for goods from other States. Similar principles justify the prohibition of discrimination by theaters and other places exhibiting motion pictures, athletic events, or other forms of live entertainment.

The basis for forbidding racial discrimination by hotels and motels, such as that operated by appellant, is equally clear. The testimony before Congress shows that the unavailability to Negroes of adequate places of lodging interferes significantly with interstate travel. Negroes are required to travel excessive distances between places of lodging, are subjected to the humiliation of frequent rebuffs, are often forced to travel circuitous routes to find lodging, and must frequently accept inferior accommodations. The predictable result—a significant deterrence of interstate travel by Negroes—has in fact occurred.

The power of Congress, under the commerce clause, to remove these burdens and alleviate these hardships is clearly established. Racial discrimination by interstate motor, rail, and air carriers has been forbidden for years. The prohibition extends not only to the carriers themselves but to the terminal facilities they use, *e.g.*, a terminal restaurant. The power of Congress is clear, for, as this Court said in *Boynton* v. *Virginia*, 364 U.S. 454, 463, interstate travelers "have to eat" and a terminal restaurant exists for the very purpose of serving the need of intrastate and interstate travelers. Similarly, interstate travelers have to sleep, and hotels and motels are devoted to serving this need of both local and interstate travelers. Indeed, because of the burden which a lack of hotel accommodations imposes on interstate travel, the National Labor Relations Board has frequently assumed jurisdiction (with the Court's explicit approval) over the labor relations of hotels. The effect on travel of a denial of lodging accommodations to Negroes is, of course, at least as significant, certain, and direct as is the effect on travel of an unfair labor practice engaged in by a hotel.

Finally, elimination of the burden on interstate travel resulting from a refusal to furnish equal lodging accommodations to Negroes requires and justifies a prohibition of discrimination against all Negroes, whether they are engaged in intrastate or interstate travel. Congress acted well within its prerogatives in deciding that Negro interstate travelers should not

be subjected either to the risk of being unable to prove their "interstate status" or to the burden of carrying some form of proof; either alternative interferes with interstate travel. More basically, requiring Negroes to prove their "interstate status," while whites evidently were not subjected to that requirement, would impose upon Negro travelers the very discrimination that the Act was intended to prevent.

2. Title II of the Civil Rights Act of 1964 does not violate appellant's rights under the Fifth Amendment. The "due process" clause grants no immunity from reasonable regulations of business and commercial activity. *Ferguson* v. *Skrupa*, 372 U.S. 726. Both the existence of the common law innkeeper's obligation and this Court's decisions upholding local anti-discrimination laws testify to the reasonableness of the regulation of hotels and motels imposed in this case. See, *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100. Nor was appellant's property taken without just compensation. Such consequential damage as a person may suffer from valid regulation of a business does not constitute a "taking" within the meaning of the Fifth Amendment. *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155.

3. Appellant corporation is not subjected to involuntary servitude in violation of the Thirteenth Amendment. A requirement of furnishing equal treatment to Negroes as a condition of operating a particular business is not a requirement "akin to African slavery." *Butler* v. *Perry*, 240 U.S. 328, 332. The present statute was preceded by public accom-

modation laws in thirty States and the District of Columbia (see *District of Columbia* v. *John R. Thompson Co., supra*) and these in turn merely extend the common-law innkeeper rule. Certainly the framers of the Thirteenth Amendment, who hoped to remove the disabilities imposed on Negroes, did not intend either to invalidate the innkeeper rule or place discrimination in places of public accommodation beyond the reach of both federal and State law.

ARGUMENT

INTRODUCTION

Section 201(a) of the Civil Rights Act of 1964 provides—

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation * * *, without discrimination or segregation on the ground of race, color, religion, or national origin.

Section 201(b) lists four kinds of business establishment each of which is defined as a place of public accommodation, within the meaning of Section 201(a) if either of two bases of coverage is satisfied, *viz*—

> if its operations affect commerce, or if discrimination or segregation by it is supported by State action.

Section 201(c) defines the meaning of the phrase "affect commerce," as applied to each kind of establishment listed in Section 201(b). The first is "any inn, hotel, motel, or other establishment which pro-

vides lodging to transient guests."[7] Such establishments are deemed *per se* to affect commerce. Restaurants, cafeterias, lunchrooms and similar facilities, and also gasoline stations, make up the second class. They are declared to affect interstate commerce within the meaning of Title II if they serve interstate travelers or if a substantial portion of the food which they serve or products which they sell "has moved in commerce." The third class—motion picture houses and other places of exhibition—are deemed to affect commerce if the films or persons providing the entertainment move in interstate commerce. The fourth class is made up of establishments which are an integral part of any of the foregoing places of public accommodation.

Section 201(d) defines the meaning of "supported by State action."

The statute, if constitutional, is admittedly applicable to appellant's place of business under the first ground of coverage. It is a "motel" which provides lodging to transient guests, and it does not fall within the only relevant exception.[8] It is also undisputed that appellant did in fact refuse to provide lodging to Negroes on account of their race and color, and intends to continue the discrimination in the absence of a court order. The sole question here, is the constitutionality of the statute, which appellant claims

[7] There is an exception for "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." Section 201(b)(1).

[8] Note 7, *supra*.

exceeds the power of Congress, invades the reserved powers of the States, and violates the limitations imposed by the Fifth and Thirteenth Amendments.[9]

The provisions summarized above make it plain that Congress invoked both its power to regulate interstate commerce under Article I, Section 8, clause 3, and also its power under Section 5 of the Fourteenth Amendment to enforce, by appropriate legislation, the provisions of that Amendment. The stipulation before the district court shows that 75 percent of appellant's guests come from outside the State of Georgia, that appellant accepts convention trade from other States, and that appellant widely solicits patronage in advertising media having a national circulation. Accordingly, the government has proceeded throughout this litigation upon the theory that the constitutionality of Title II, as applied to appellant, may be sustained under the commerce clause without reference to the additional power conferred by Section 5 of the Fourteenth Amendment. We stake our case here upon the same theory.

The decision in the *Civil Rights Cases,* 109 U.S. 3, is therefore irrelevant. In declaring unconstitutional the Act of 1875 (which prohibited discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," 18 Stat. 335, 336), the Court did not consider whether the Act would have been constitutional if Congress had attempted to exercise its commerce power; for, as the

[9] See amended notice of appeal (R. 83): "The sole question presented by the appeal is the constitutionality of the Civil Rights Act of 1964."

Court noted, the statute was "not conceived in any such view" (*id.* at 19).[10] The Court's observation that "[o]f course, no one will contend that the power to pass it was contained in the Constitution before adoption of the last three amendments" (*id.* at 10), was directed to the statute as it came before the Court, a law covering many local inns, public conveyances and theatres without regard to their relation to interstate commerce and therefore obviously conceived in a different view. The holding of the *Civil Rights Cases,* therefore, is necessarily limited to the proposition that, in the circumstances presented, the Act could not be sustained under the Thirteenth and Fourteenth Amendments.[11] This limitation is made entirely clear by the subsequent decision in *Butts* v. *Merchants & Miners Transp. Co.,* 230 U.S. 126, where it was argued that the Act of 1875 should be held valid as applied to a vessel under the exclusive admiralty jurisdiction of the United States. The Court rejected the contention on the ground that the *Civil Rights Cases* had held that the provisions of the 1875 Act received "no support from the power of Congress to regulate interstate commerce because, as is shown by the preamble and

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[10] The point was barely noted by counsel as we will explain in more detail in our brief in *Katzenbach* v. *McClung*, No. —, this Term.

[11] We refer to "the circumstances presented" because the Court, in the *Civil Rights Cases*, expressly assumed the availability of a State remedy for the discrimination covered by the federal statute (109 U.S. at 19, 24–25). We also wish to point out that in stressing the commerce power in the instant brief—a power which we believe to be clearly and completely dispositive of the case—we imply no suggestion that the Act may not be sustained as an exercise of the power conferred by Section 5 of the Fourteenth Amendment.

by their terms, they were not enacted in the exertion of that power * * *." 230 U.S. at 132. The 1964 Act explicitly relies upon the power of Congress to regulate interstate commerce. As we now show, the Act plainly represents a permissible exercise of that power. Thereafter, we take up the arguments under the Fifth and Thirteenth Amendments.

I

TITLE II OF THE CIVIL RIGHTS ACT OF 1964, BOTH IN ITS GENERAL PLAN AND AS APPLIED TO PETITIONER, IS A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE

Article I, Section 8, clause 3, of the Constitution confers upon the federal Congress power "to regulate Commerce * * * among the several States." In arguing that the commerce power is broad enough to sustain both the general plan of Title II and also its specific application to petitioner, we invoke no novel constitutional doctrine and seek no extension of existing principles. The constitutionality of Title II, under the commerce clause, is established by five established rules. All five are a familiar part of our constitutional history.

First. The delegation to Congress of power to regulate commerce among the several States "authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce" (*The Daniel Ball,* 10 Wall. 557, 564), and "to promote its growth" (*Mobile County* v. *Kimball,* 102 U.S. 691, 696, 697). This principle, established many years ago, has been frequently reiterated. *E.g., Labor*

Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37. Interstate commerce, needless to say, includes interstate travel by men and women. *Edwards* v. *California*, 314 U.S. 160.[12]

Second. The power of Congress to promote commerce among the States includes the power to regulate local activities—in the State of destination as well as the State of origin—which might have a substantial and harmful effect upon interstate com-

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[12] "[I]t is settled beyond question that the transportation of persons is 'commerce,' within the meaning of" the commerce clause. *Edwards* v. *California*, 314 U.S. 160, 172. "The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution * * *." *Caminetti* v. *United States*, 242 U.S. 470, 491. "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, * * * as well as the purchase, sale and exchange of commodities." *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 203. To the same effect, see *United States* v. *Hill*, 248 U.S. 420, 423; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U.S. 204, 218–219; *Hoke* v. *United States*, 227 U.S. 308, 320. Accord: *Mitchell* v. *United States*, 313 U.S. 80; *Henderson* v. *United States*, 339 U.S. 816; *Boynton* v. *Virginia*, 364 U.S. 454; *Morgan* v. *Virginia*, 328 U.S. 373; *Hall* v. *De Cuir*, 95 U.S. 485.

Moreover, "[i]t is inmaterial whether or not the transportation is commercial in character. See *Caminetti* v. *United States*, *supra*." *Edwards* v. *California*, *supra* at 172 n. 1.

While, as appellant says, Mr. Justice Barbour in *Mayor of New York* v. *Miln*, 11 Pet. 102, 136, decided in 1837, suggested that only goods and not persons are "the subjects of commerce" within the constitutional provision, that decision—insofar as it may have held any such thing—was overruled in the *Passenger Cases*, 7 How. 283, and in *Henderson* v. *Mayor of New York*, 92 U.S. 259. Indeed, the suggestion in *Miln* was quite inconsistent with the broad language of *Gibbons* v. *Ogden*, 9 Wheat. 1.

merce. "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Manufactrers Ass'n.*, 336 U.S. 460, 464. "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421." *United States* v. *Darby*, 312 U.S. 100, 118–119 (per Mr. Chief Justice Stone).

Third. The power of Congress to regulate activities affecting interstate commerce is not to be determined by looking only at the quantitative effect of the individual activities of the person or enterprise immediately involved in litigation. "Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Labor*

Board v. *Reliance Fuel Corp.*, 371 U.S. 224, 226. This principle is illustrated by *Wickard* v. *Filburn*, 317 U.S. 111, in which the Court sustained the validity of regulations limiting the quantity of wheat a farmer could grow for consumption on his own farm. An increase in the amount of wheat grown for home consumption obviously reduced the total demand for wheat sold in interstate commerce. Speaking for the Court, Mr. Justice Jackson said (*id.* at 127–128):

> * * * That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

To the same effect, see *Polish National Alliance* v. *Labor Board*, 322 U.S. 643; *Labor Board* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 685, n. 14; *Labor Board* v. *Fainblatt*, 306 U.S. 601.

Fourth. Congress, in exercising its power to foster and promote interstate commerce, may deal incidentally with social or moral wrongs that affront the human personality in addition to their deleterious commercial consequences. That power was implicitly sustained a score of years ago in *Mitchell* v. *United States*, 313 U.S. 80, 94. See also *Henderson* v. *United States*, 339 U.S. 816. More recently, the exercise of an identical power in the case of restaurants operated by interstate motor carriers was sustained in *Boynton* v. *Virginia*, 364 U.S. 454.

Nor is there anything unique in the treatment of racial discrimination. The Court has often sustained

the action of Congress in barring use of the channels of interstate commerce for the purpose of prostitution [13] or gambling.[14] Similarly, the constitutionality of legislation has been sustained where its purpose was to prevent the use of interstate commerce in carrying out criminal enterprises.[15] Consumers and investors have been protected against fraud in the sale of products [16] and securities.[17] Time and time again, Congress has exercised the commerce power to eliminate discrimination of other kinds—discrimination against particular shippers [18] or small sellers [19] or members of labor unions.[20]

Fifth. Neither the Ninth nor the Tenth Amendment to the Constitution operates as a limitation upon the powers granted to Congress in the main body of the Constitution. "[T]he Ninth Amendment * * * in insuring the maintenance of the rights retained by the people does not withdraw the rights which are

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[13] *Caminetti* v. *United States*, 242 U.S. 470; *Hoke* v. *United States*, 227 U.S. 308.

[14] *Lottery Case*, 188 U.S. 321.

[15] *Brooks* v. *United States*, 267 U.S. 432.

[16] *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385; *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149; cf. *United States* v. *Sullivan*, 332 U.S. 689; *Hipolite Egg Co.* v. *United States*, 220 U.S. 45.

[17] *Securities and Exchange Comm.* v. *Ralston Purina Co.*, 346 U.S. 119, 124; *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40.

[18] *United States* v. *Baltimore & Ohio R.R. Co.*, 333 U.S. 169.

[19] *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115.

[20] *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1; cf. *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192; *Railway Employees Dep't.* v. *Hanson*, 351 U.S. 225.

expressly granted to the Federal Government." *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 330–331. "From the beginning and for many years the [Tenth] amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 324, 325; *McCulloch* v. *Maryland, supra,* 405, 406." *United States* v. *Darby,* 312 U.S. 100, 124. See, also, *United States* v. *Sprague,* 282 U.S. 716, 733; *Oklahoma* v. *Atkinson Co.,* 313 U.S. 508, 534; *Case* v. *Bowles,* 327 U.S. 92, 102. Since Congress had power under the commerce clause to enact the Civil Rights Act of 1964, the Act does not invade any rights reserved to the States or the people by the Ninth and Tenth Amendments.

So far as the power of Congress under the commerce clause is concerned, therefore, decision upon the constitutionality of Title II turns upon a single, simple question—Is there a rational basis for the legislative determination that discrimination on grounds of race or color in places of public accommodation—in particular, by hotels and motels receiving transient guests—burdens and obstructs interstate commerce? The evidence before Congress, we shall show, provides overwhelming support for an affirmative answer to that question.

Because this is the initial case involving Title II to come before the Court we deem it appropriate first

to discuss the evidence before Congress showing that racial discrimination in places of public accommodation covered by Title II so burdens and obstructs interstate commerce, as a matter of fact, as to be a truly national problem requiring federal action under the commerce clause. We then turn to the particular type of establishment involved in the instant case—a motel which solicits the patronage of interstate travelers and 75 percent of whose clientele are in fact from out-of-State—and show that, as applied to it and other hotels and motels, Title II does not go beyond the constitutional power to regulate interstate commerce.

A. DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION IMPOSES BURDENS UPON THE MOVEMENT OF INTERSTATE COMMERCE OF A KIND WHICH CONGRESS HAS POWER TO ELIMINATE

The outstanding fact of our national life during the past decade has been the endeavor to realize, as applied to Negroes and other minorities, the promise of the Declaration of Independence that all men are created equal. Racial segregation and discrimination in places of public accommodation, which are not confined to any section of the country, gave rise to a wide variety of protests including boycotts, picketing, mass demonstrations and other forms of economic warfare. As the Attorney General told the House Judiciary Subcommittee considering the civil rights bill, "Many of the demonstrations * * *, and the violence which has sometimes accompanied them, stem from attempts by Negro citizens to gain access to such

facilities as restaurants, lunch counters, places of amusements, stores, hotels, and the like." [21]

The problem has nationwide scope and is of almost incredible proportions. The Attorney General testified before the Senate Judiciary Committee that just between May 20 and July 31, 1963 (the date of his testimony) there were 639 demonstrations in 174 cities, 32 States, and the District of Columbia. Of these, 302 were concerned solely with discrimination in places of public accommodation.[22] Assistant Attorney General Marshall wrote Senator Javits on April 14, 1964, furnishing later figures (110 Cong. Rec. 7980 (daily ed.)). From May 1963 to April 1964, a total of 2,422 racial demonstrations took place, of which 850 arose from disputes about discrimination in places of public accommodation. The Mayor of Atlanta, Georgia, testifying in favor of enactment, stated that "[f]ailure by Congress to take definite action at this time * * * would start the same old round of squabbles and demonstrations that we have had in the past." [23]

The effect in many areas upon general business conditions and, therefore, on interstate commerce was

[21] Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 88th Cong., 1st Sess., on Miscellaneous proposals regarding civil rights, Ser. No. 4, part II, p. 1373. These hearings are hereafter cited as "*House Subcomm. Hearings.*"

[22] Hearings before the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess., on S. 1731, p. 216.

[23] Report of the Committee on Commerce, United States Senate, on S. 1732, No. 872, 88th Cong., 2d Sess. (February 10, 1964), at 15, 21, quoting Mayor Ivan Allen, Jr. This report is hereafter cited as "*Senate Commerce Report.*"

dramatic. The very purpose of boycotts and picketing, of course, is to discourage business. Under Secretary of Commerce Roosevelt testified that "[i]t is common knowledge that discrimination in public accommodations and demonstrations protesting such discrimination have had serious consequences for general business conditions in numerous cities in recent years." Hearings before the Committee on Commerce, United States Senate, 88th Cong., 1st Sess., on S. 1732, Part 2, Ser. 27, at 699.[24] The examples he described are impressive.

Retail sales in Birmingham were reported off 30 percent or more during the protest riots in the spring of 1963. Businessmen stated that there were more business failures than during the depression. Downtown stores privately reported that their sales in April of that year were off 40 to 50 percent. They were hit first by a Negro boycott and then by a tense atmosphere that kept customers at home or in suburban shops. The Federal Reserve Bank showed department store sales in Birmingham in the four-week period ending May 18, 1963, down 15 percent over the same period in 1962. During the same period, department store sales were up in Atlanta, New Orleans, and Jacksonville. *Ibid.*

Other cities had similar experience. In Atlanta, Mr. Roosevelt testified, "after several months of intermittent demonstrations in 1960–1961, and a boycott sparked by student groups to remove racial barriers

[24] These hearings are hereafter cited as "*Senate Commerce Hearings.*"

in lunch counters and department store restaurants, merchants agreed that the Negro boycott of the downtown area was almost 100 percent effective." Department store sales for a one-week period in February 1961 were down 12 percent from the preceding year, according to the Federal Reserve Bank. *Senate Commerce Hearings,* at 699–700. In Savannah, lunch-counter discrimination in downtown stores finally ended following "a 15-month boycott of the stores by Negroes * * *." This boycott "cut retail sales as much as 50 percent in some places." In the fall of 1962 businessmen in Charlotte, North Carolina, "hit by drives for desegregation of public accommodations, estimated their business was cut by 20 to 40 percent." In Nashville, Tennessee, a boycott was maintained for seven weeks at 98 percent efficiency (*Senate Commerce Hearings,* at 700):

> Negroes in Nashville spend an estimated $7 million annually downtown and their absence had varying results. In one department store, they represented 12 to 15 percent of the business; in another department store, 5 percent. The transit company found its revenues dwindling seriously; the two newspapers found advertising linage figures failing.

"Variety stores," Mr. Roosevelt continued, "were hit particularly hard. With their lunch counters a sit-in target, even those who did venture downtown avoided the food counters, which sometimes account for as much as 50 percent of the gross profit." Even businessmen not involved in the sit-ins and which had

reputations of good service to Negroes found business dropping." *Ibid.*

It is evident that such a general downturn in retail business must, if left unchecked, result in serious disruption in the flow of goods across State lines; if retail stores cannot sell, they in turn will not buy from wholesalers, who in turn must necessarily reduce their out-of-State purchases. In a highly interdependent economy, as Congressmen McCulloch, Lindsay, and other Republican members of the House Judicial Committee observed, "a local disturbance can affect the commerce of an entire State, region, and the country."[25] Or, as a "top retail executive" said, "[t]his thing has frightening ramifications. It is more serious than people realize. It has now become an economic situation affecting an entire community, the whole city, and the whole country."[26]

Less obvious, but no less important, is the impact of racial disputes and civil unrest upon the flow of investment. Congress was told of companies which had decided, because of such disputes, not to open plants and offices in Birmingham and Montgomery.[27]

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[25] "Additional Views" of Congressmen McCulloch, Lindsay, and other Republican committee members, filed in support of the Report of the House Judiciary Committee, 88th Cong., 1st Sess., No. 914, Part 2, on H.R. 7152 (December 2, 1963) at 12. This document is hereafter cited as "*Additional Views.*"

[26] Report of the Legislative Reference Service, Library of Congress, to the Chairman of the Senate Commerce Committee, "An Episodic Account of Economic Effect of Segregation and Resistance to Segregation in the South," *Senate Commerce Hearings*, at 1384.

[27] *Id.* at 1385.

Congressman McCulloch, summarizing the evidence, stated: The "segregation of public accommodations and other sources of racial unrest in Birmingham, Ala., have induced many businesses to reconsider their plans to move into or to expand their existing operations in the area." *Additional Views,* at 12.

The story had been the same in Little Rock. As Under Secretary Roosevelt testified (*Senate Commerce Hearings,* at 699):

> In the 2 years before the crisis over schools and desegregation of public accommodations erupted into violence in Little Rock in September 1957, industrial investments totaled $248 million in Arkansas. During the period, Little Rock alone gained 10 new plants, worth $3.4 million, which added 1,072 jobs in the city. In the 2 years after the turbulence which brought Federal troops to the city, not a single company employing more than 15 workers moved into the Little Rock area. Industrial investments in the State as a whole dropped to $190 million from $248 million of the 2 years before desegregation.

We have no need to argue that the impact upon interstate commerce of these widespread disputes would alone support federal legislation outlawing racial discrimination, without a specific showing of a relationship between a particular establishment and the movement of goods in interstate commerce. No such question is presented here because, except in the case of hotels and motels, Congress covered only establishments each of which could be shown to have

its own individual link to interstate commerce. In the case of hotels and motels that link, as we show in the next subdivision of our argument, follows automatically from their entertainment of transient guests. But the disputes and their impact upon interstate commerce do show that the problem is not only social and moral—but national and commercial. The importance of any individual establishment and of its link to commerce must be judged not as an isolated phenomenon but as part of a complex and interrelated national problem having the major impact upon interstate commerce described above. Cf. *Wickard* v. *Filburn,* 317 U.S. 111.

Settled precedents establish the constitutional sufficiency of the individual links to commerce required by Section 201(c) before Section 201(a) becomes applicable to any place of public accommodation.

Restaurants, lunch counters, etc. In the case of an establishment serving food or selling gasoline, it must appear that "a substantial portion of the food which it serves or * * * products which it sells, has moved in commerce." (Section 201(c)(2).) Current history makes all too clear the danger that racial segregation or discrimination in such a place may lead to picketing or other demonstrations. That dispute would, in turn, create danger of closing the establishment or reducing its patronage with a consequent interruption in the flow of goods from other States. The situation is the same in principle as the countless cases in which the courts have sustained the application of the National Labor Relations Act to establishments receiving

goods in interstate commerce on the ground that a labor dispute at such an establishment might result in a strike or other concerted activity that would curtail the interstate flow of goods.

The point is illustrated by this Court's decision in *Labor Board* v. *Reliance Fuel Corp., supra,* which is merely the latest in a long series of cases basing federal power over the labor relations of a retail business on the threat to the market for interstate goods caused by labor disputes which involve businesses that purchase goods from other States. See, *e.g., Labor Board* v. *Denver Bldg. & Const. Trades Council,* 341 U.S. 675, 683–684; *May Department Stores Co.* v. *Labor Board,* 326 U.S. 376 (retail store); *J. L. Brandeis & Sons* v. *Labor Board,* 142 F. 2d 977 (C.A. 8), certiorari denied, 323 U.S. 751 (retail store); *McLeod* v. *Bakery Drivers Local,* 204 F. Supp. 288 (E.D. N.Y.) (bakery); *Retail Fruit & Vegetable Union* v. *Labor Board,* 249 F. 2d 591 (C.A. 9) (retail store); *Int'l Brotherhood* v. *Labor Board,* 341 U.S. 694 (construction project); *Local 74* v. *Labor Board,* 341 U.S. 707 (store, dwelling renovation). As the court of appeals said in *J. L. Brandeis & Sons* v. *Labor Board* (142 F. 2d at 980–981) *supra:*

> It is urged, also, that when shipment of out-of-state merchandise come to rest in the store interstate commerce ends and what may occur thereafter does not directly affect it. If when selling at the store stops purchasing outside the state also stops, it is fair to say that the latter is the effect of the former * * *. In determining its own jurisdiction the Board properly considered the possible effect of labor strife in

> the store upon the flow of merchandise purchased and shipped from outside the state to maintain the constantly diminishing stock offered for sale at retail.

In particular, the Labor Board has on many occasions regulated labor relations in restaurants, on the theory that disputes in restaurants tend to diminish the quantity of food and other products from other States purchased by the restaurant to serve its customers. See, *e.g.*, *Labor Board* v. *Morrison Cafeteria Co. of Little Rock*, 311 F. 2d 534 (C.A. 8); *Labor Board* v. *Local Joint Board*, 301 F. 2d 149 (C.A. 9); *Labor Board* v. *Childs Co.*, 195 F. 2d 617 (C.A. 2); *Labor Board* v. *Laundry Drivers Local*, 262 F. 2d 617 (C.A. 9); *Labor Board* v. *Gene Compton's Corp.*, 262 F. 2d 653 (C.A. 9); *Labor Board* v. *Howard Johnson Co.*, 317 F. 2d 1 (C.A. 3), certiorari denied, 375 U.S. 920; *Kennedy* v. *Los Angeles Joint Board*, 192 F. Supp. 339 (S.D. Cal.).[28] These cases provide conclusive authority to sustain the applicability of the Civil Rights Act of 1964 to a restaurant (and, by close analogy, to a gasoline station) which obtains from the channels of interstate commerce a significant portion of the goods it uses or sells.

The reduction in the business—and therefore in the purchase of goods from other States—of a restaurant or a gasoline station which is involved in a racial

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[28] See also, *Brennan's French Restaurant*, 129 N.L.R.B. 52; *Stork Restaurant, Inc.*, 130 N.L.R.B. 543; *Joe Hunt's Restaurant*, 138 N.L.R.B. 470; *Childs Co.*, 88 N.L.R.B. 720; *Childs Co.*, 93 N.L.R.B. 281; *Bolton & Hay*, 100 N.L.R.B. 361; *The Stouffer Corp.*, 101 N.L.R.B. 1331; *Mil-Bur, Inc.*, 94 N.L.R.B. 1161.

dispute is not the only, or even the most direct, effect on interstate commerce caused by racial discrimination in such establishments. A second and still more direct link between such discrimination and interstate commerce is the reduction in the number of potential customers caused by the discouragement of Negro patronage; this in turn reduces the quantity of goods purchased through interstate channels. As the Attorney General testified (*Senate Commerce Hearings,* at 18–19): "Discrimination by retail stores which deal in goods obtained through interstate commerce puts an artificial restriction on the market and interferes with the natural flow of merchandise."

It is clear that the aggregate effect of racial discrimination by restaurants (and gasoline stations) is substantially to restrict the market for food and other goods. Indeed, that is simply a truism. Not only is the market restricted because established businesses sell less, but also because many new businesses are doubtless not opened because of the narrowed market resulting from the exclusionary practices. This restriction on the market, in turn, retards the flow of goods in interstate channels. Congress plainly has power to legislate this result.

The testimony of Under Secretary Roosevelt is revealing with respect to the effect of policies of racial exclusion in retail establishments, including restaurants, on the scope of the market for food and other products sold by such places. His testimony was that Negroes spend less money per capita, *after discounting income differences,* than do whites in restaurants,

theaters, and the like, and that the disparity is especially aggravated in the South where such exclusionary practices are widespread. He attributed this to racial discrimination. *Senate Commerce Hearings,* at 695.

For example, Mr. Roosevelt testified that "Negroes in large northern cities spend more than southern Negroes of the same income class in all of these expenditure categories [*i.e.,* restaurants, theaters, recreational facilities, hotels, motels] * * *, even though white families in northern cities spend less than similar families in southern cities." "In the same income group," he said, "northern Negroes spend more than northern whites for [theaters and recreation], but southern Negroes spend less than southern whites and northern Negroes. Negroes in both the North and South spend less on 'Food eaten away from home' than white people in the same income groups, but the difference is much greater in the South." *Ibid.*[29]

The power of Congress to prohibit the widespread practice of discrimination against Negro customers by restaurants and gasoline stations is amply sustained by the Sherman Act precedents forbidding similarly arbitrary, though far less sweeping, restrictions on the market for goods and services. Even a limited group of sellers, for example, cannot agree not to deal with any particular class of customers. See, *e.g., United States* v. *First National Pictures Inc.,* 282 U.S. 44; *Fashion Originators' Guild of America*

[29] The statistics furnished Congress by the Commerce Department are set out in Appendix B, *infra,* p. 70.

v. *Federal Trade Commission,* 312 U.S. 457. Nor can they agree to deal with their customers only on common terms. Even though customers may be able to obtain the goods from other sellers, Congress can reach the restraint because it "interferes with the natural flow of interstate commerce." *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, 213. For the same reason, a widespread refusal of retail establishments to sell to Negro customers interferes with the flow of interstate commerce, even though it may remain open to these customers to patronize other sellers. Cf. *Goldman Theaters Inc.* v. *Loews Inc.,* 150 F. 2d 738 (C.A. 3), certiorari denied, 334 U.S. 811; *Labor Board* v. *Bradford Dyeing Assn.,* 310 U.S. 318, 326.

Theatres and other exhibitions. Sections 201 (b) and (c), read together, prohibit racial discrimination or segregation in "any motion picture house, theatre, concert hall, sports arena, stadium or other place of exhibition or entertainment" if it "customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in [interstate] commerce." Proof of the latter fact links such an establishment to commerce in two ways, each of which is constitutionally sufficient to show that the prohibition against racial segregation or discrimination is, in truth, a measure fostering and promoting interstate commerce.

First, continued discrimination would create a risk of picketing and similar demonstrations threatening to block the flow of films into the State or the interstate travel of performers. In this respect, the factual link between these establishments and interstate

commerce, and also the principles sustaining their coverage, is the same as in the case of restaurants and gasoline stations. Here, again, decisions under the National Labor Relations Act provide exact precedents. *National Labor Relations Board* v. *Combined Sentry Theatres, Inc.*, 278 F. 2d 306 (C.A. 2). See, also, *Labor Board* v. *Gamble Enterprises, Inc.*, 345 U.S. 117; *Balaban & Katz*, 87 NLRB 1071; *Fox Midwest Amusement Corp.*, 98 NLRB 699.

Second, discriminatory practices in places of entertainment artificially restrict the demand for films and performers from out-of-State sources, and thus lessen the flow of commerce. The Senate Committee on Commerce reported (S. Rep. 872, 88th Cong., 2d Sess., p. 20)—

> discriminatory practices in places of entertainment or amusement not only artificially restrict the demand for entertainment

but that a number of orchestras and companies of actors were unwilling to visit cities in which theatre facilities were segregated. The Committee cited specifically the refusal of the New York Metropolitan Opera Company to go to Birmingham, where it had previously had an annual season, and the rules of Actor's Equity and American Guild of Variety Artists sanctioning the refusal of their members to perform in places where the audience was segregated. *Ibid.*

The power of Congress to deal with artificial obstructions affecting the interstate movement of films and entertainers has been recognized in a variety of decisions under the Sherman Act. In *Interstate Circuit* v. *United States*, 306 U.S. 208, 219, the Court

noted that the effect of a conspiracy among distributors imposing restraints upon the exhibition of motion pictures was to cause some exhibitors to "increase their admission price, * * * and to abandon double billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures * * *." In turn, "the effect of the restrictions upon 'low-income members of the community' patronizing the theatres of these exhibitors was to withhold from them altogether the 'best entertainment furnished by the motion picture industry' * * *." The widespread exclusion of Negroes from motion picture theatres and similar places of entertainment has the same effect upon interstate commerce and upon the public interest. For other cases sustaining the power of Congress over the entertainment industry, including the exhibitors, see *Interstate Circuit* v. *United States*, 306 U.S. 208; *White Bear Theatre* v. *State Theatre Corp.*, 129 F. 2d 600 (C.A. 8); *Youngclause* v. *Omaha Film Board*, 60 F. 2d 538 (D. Neb.); *IPC Distributors* v. *Chicago Union*, 132 F. Supp. 294 (C.A.D.C.), or stage attractions, *United States* v. *Shubert*, 348 U.S. 222, or professional boxing matches, *United States* v. *I.B.C.*, 348 U.S. 236, or football games, *Radovich* v. *Nat'l Football League*, 352 U.S. 445, although these activities are ordinarily thought of as "local affair[s]." *United States* v. *I.B.C.*, *supra* at 241.

Related Establishments. Sections 201(a) and (b) extend the guarantee of equal service and accommodations to all establishments which either (i) are physically within the premises of a covered establishment or (ii) include within their premises a covered establishment and hold themselves out as serving its patrons. There is no need to discuss, in the instant case, the exact scope of these provisions. Both arise from the departmentalization of many enterprises, especially department stores, and of leasing to different operators portions of a single physical establishment which operates largely as a functional unit and serves much the same clientele. Thus, the news stand or flower shop in a covered hotel, from the standpoint of those staying at the hotel, is in substance part of the one enterprise. The two are also intimately associated from the standpoint of both the hotel management and the operators of the news stand or flower shop. Similarly, the ownership of a restaurant or lunch counter located in a bowladrome may be different from the ownership of the alleys, but the operators present them as a functional unit and they serve a common clientele which rarely distinguishes the management of one from the management of the other.

The constitutional basis for the coverage of such "related establishments" is the same as that which sustains the federal regulation of the establishment giving rise to the expanded coverage. No further problems would seem to be involved. Congress has ample power to take account of the physical and functional interrelationships, especially where the prac-

tices of one are bound to affect the patronage and practices of the other. The drawing of such lines is an essential part of the legislative function. Cf. *Boynton* v. *Virginia*, 364 U.S. 454; *Currin* v. *Wallace*, 306 U.S. 1; *United States* v. *Darby*, 312 U.S. 100, 121. See, also, *Purity Extract Co.* v. *Lynch*, 226 U.S. 192; *Everard's Breweries* v. *Day*, 265 U.S. 545.

It may be argued that Congress could have found other methods of dealing with the obstructions to interstate commerce such as outlawing the demonstrations resulting from racial discrimination. How an obstruction to commerce shall be removed—what means are "necessary and proper" to remove it—is a question for legislative discretion, provided that the means chosen are reasonably adapted to the permissible end. Here, Congress determined to end the offensive and immoral practices of racism in places of public accommodations having a substantial relation to interstate commerce. Its action is consonant with our entire constitutional history since 1865. Attempts to suppress the aspirations of the victims of discrimination would have been an affront to civilization. It is an understatement to say that the choice was reasonable, although the Constitution requires no more.

B. DISCRIMINATION IN HOTELS AND MOTELS SERVING TRANSIENT GUESTS IMPOSES BURDENS UPON INTERSTATE TRAVEL OF A KIND WHICH CONGRESS HAS POWER TO ELIMINATE

1. Racial discrimination in hotels and motels, in fact, burdens interstate travel

Congress had before it overwhelming evidence that discrimination by hotels and motels impedes interstate

travel by Negroes, and interstate travel is, of course, a form of interstate commerce. *Edwards* v. *California*, 314 U.S. 160.[30] The plain truth is that in many places lodging is simply not available to Negro travelers. For example, a report of the Senate Commerce Committee describes evidence that "a Negro traveling by car from Washington, D.C., to New Orleans must travel an average of 174 miles between establishments that will provide him with suitable lodging."[31] *Senate Commerce Report*, at 18. Even then he has little assurance of finding lodging. "Many of these establishments are small and there is often no vacancy for the traveler who seeks accommodations in the latter part of the day." *Id.* at 18.

Testimony presented to the Senate Commerce Committee by Under-Secretary of Commerce Roosevelt elaborates on the point. For a trip between Washington, D.C., and Miami, the average distance between accommodations of "reasonable" quality which were open to Negroes was found to be 141 miles, or several hours of driving. Moreover, since the motels and hotels that will take Negroes have, on an average, only about fifteen units, it is "quite obvious that a traveling family might find that they had finally reached one of the accommodations but only to find

[30] See n. 12, p. 18, *supra*.

[31] This information had been originally prepared by the publisher of a special guidebook for Negroes, and presented to the Committee by Under-Secretary of Commerce Franklin D. Roosevelt, Jr. As the Under-Secretary remarked, the "very existence" of such a special guidebook is "dramatic testimony to the difficulties" a Negro traveler encounters. *Senate Commerce Hearings*, at 693–694.

no vacancy or that it was filled up." Summarizing the evidence as to the availability of lodging places along three representative routes (Washington, D.C., to Florida, Chicago to New Orleans, and Washington, D.C., to New Orleans), the Under Secretary said that Negroes "would have an extremely slender choice in attempting to find overnight accommodations in hotels and motels serving white travelers along the same routes." *Senate Commerce Hearings*, at 692–694.[32]

The exclusionary practices were not limited to any one area. As the Under Secretary stated, "[t]here is no question that this discrimination in the North still exists to a large degree," and in the West and Midwest as well. *Id.* at 735. See, also, testimony of Mr. Roy Wilkins, Executive Secretary of the National Association for the Advancement of Colored People, that a Negro encountered almost the same difficulty finding lodging in a small town in Iowa as in Alabama. *Senate Commerce Hearings*, at 657.

Other testimony before Congress showed that the unavailability of lodging facilities had both a qualitative and a quantitative effect upon interstate travel by Negroes. The quality—that is, the pleasure, convenience, and ease—of travel by Negro citizens was

[32] Referring to the average distance between suitable accommodations which the Committee later noted, the Under Secretary testified that "even if we cut in half the average of 141 miles on the Washington to Miami trip, or the 174 miles on the New Orleans drive, we would still have considerable distances over which Negroes would typically have to drive before they could expect to find reasonable accommodations open to them on the same basis as white travelers." *Senate Commerce Hearings*, at 694–695.

obviously impaired in a serious manner by their inability to find suitable overnight accommodations while *en route* from State to State. Quoting the testimony of Mr. Roy Wilkins, the Senate Commerce Committee stated (*Senate Commerce Report* at 15–16):

> For millions of Americans this [July 1963] is vacation time. Swarms of families load their automobiles and trek across the country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S.C., or from Jacksonville, Fla., to Tyler, Texas.
>
> How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white?[33]

Describing the typical Negro odyssey through the Southern part of the United States, Mr. Wilkins said (*Senate Commerce Hearings*, at 657):

> Where you travel through what we might call hostile territory you take your chances. You

[33] Senator Javits, who appeared as a witness before the Senate Commerce Committee, quoted an incident from an issue of *Hotel Monthly* magazine concerning a wealthy Negro traveler, who, with his wife and children, was unable to find any hotel or motel accommodation in St. Petersburg and consequently had to sleep in his automobile with his entire family *Senate Commerce Hearings*, at 257–258.

> drive and you drive and you drive. You don't stop where there is a vacancy sign out at a motel at 4 o'clock in the afternoon and rest yourself; you keep on driving until the next city or the next town where you know somebody or they know somebody who knows somebody who can take care of you.[34]

Attorney General Kennedy testified as follows:

> And in addition to the insult, consider the physical and financial inconvenience suffered by Negroes through such discrimination.
>
> * * * * *
>
> * * * If he makes reservations without first determining whether or not the establishment will accept people of his race, he may well find on his arrival that the reservation will not be honored—or that it will somehow have been mislaid. His alternative is to subject himself and his family to the humiliation of rejection at one establishment after another—until, as likely as not, he is forced to accept accommodation of inferior quality, far removed from his route of travel.[35]

As Senator Humphrey, the principal majority spokesman for the civil rights bill, described the problems faced by Negroes contemplating an interstate journey, "[t]hey must draw up travel plans much as a general advancing across hostile territory would

[34] Referring to the problems Negroes encounter on trips, Mr. Wilkins said, "[t]he answer is that you don't figure them out. You just live uncomfortably, from day to day." *Senate Commerce Hearings*, at 657.

[35] *Senate Commerce Hearings*, at 18. See also the Attorney General's similar testimony at hearings before Subcommittee No. 5 of the House Committee on the Judiciary. *House Subcomm. Hearings*, at 1374.

establish his logistical support." 110 Cong. Rec. 6311 (daily ed.). Or, as another witness put the situation, "[f]or the white man traveling from State to State, the road is a series of familiar landmarks and frequently his most difficult problem is to make a choice among the array of establishments offering him food, lodging, and respite," but for the Negro traveler "the road may be more like a desert and each inviting sign a mirage or, worse yet, a humiliating rebuff to him, his family, or companions." [36]

Aside from the "strain of traveling long distances without respite, the nagging uncertainty of locating a decent place to eat or sleep," [37] and the concomitant humiliation and embarrassment, there were other practical inconveniences which resulted. A Negro might be forced to look for lodging at places far removed from his route of travel, or he might be compelled to follow a route less direct, desirable, or convenient than he would otherwise take.[38] He would often be obliged to accept inferior accommodations.[39] In short, as the

[36] Erwin Griswold, member of the United States Commission on Civil Rights, and Dean of the Harvard Law School, *Senate Commerce Hearings*, at 770.

[37] "*Additional Views*" at 9. See also, *Senate Commerce Hearings*, at 694–695 (testimony of Under Secretary of Commerce Roosevelt that Negroes frequently must drive longer hours than the National Safety Council recommends because of unavailability of lodging accommodations).

[38] Mr. Roy Wilkins, testifying before the Senate Commerce Committee, *Senate Commerce Hearings*, at 657.

[39] See the testimony of Attorney General Kennedy, *Senate Commerce Hearings*, at 18. See also his testimony before the House Judiciary Subcommittee, *House Subcomm. Hearings*, at 1374.

Senate committee found, "[d]iscrimination or segregation by establishments dealing with the interstate traveler subjects members of minority groups to hardship and inconvenience as well as humiliation * * *." *Senate Commerce Report,* at 17.

It is hardly surprising that the number of persons who engaged in interstate travel was diminished as a result of these conditions. The Senate Commerce Committee found that the racial discrimination and exclusion to which Negro travelers were subjected "seriously decreases all forms of travel by those subject to such discrimination." *Senate Commerce Report,* at 17–18. It noted that "a family is not encouraged to travel along a route or into an area where, because of the color of their skin, they will be denied suitable lodging or other facilities." *Ibid.*

As the head of the Civil Rights Division, Department of Justice, explained the matter, when "[a] traveler seeking a place to sleep or to eat * * * is turned away by one establishment after another solely because of his color" he "understandably becomes exasperated"; such discrimination, which "burdens Negro interstate travelers," thereby "inhibits interstate travel." *Senate Commerce Hearings,* at 206, 207 (testimony of Assistant Attorney General Burke Marshall). The ranking Republican member of the House Judiciary Committee and principal House Republican spokesman for the bill, Congressman McCulloch of Ohio, quoted Mr. Roy Wilkins to make the same point (*Additional Views,* at 9):

> As was so aptly stated, "some of them [Negroes] don't go [on interstate journeys]. The

> strain of traveling long distances without respite, the nagging uncertainty of locating a decent place to eat or sleep, or the fear of finding oneself on a lonely road at night with car trouble and no place to turn for assistance has forced innumerable families and individuals to stay at home.[40]

Under Secretary of Commerce Roosevelt, whose Department had studied the effect of discrimination on commerce, concluded that "interstate travel as far as the Negro community is concerned is very heavily burdened by the segregation of public accommodations." Elimination of these racial practices would, he concluded, result in "tourism and interstate travel greatly increased." *Senate Commerce Hearings,* at 744.[41] That was also the conclusion of N. E. Halaby, Administrator of the Federal Aviation Agency, who wrote to Senator Magnuson, Chairman of the Senate Commerce Committee, that ending discrimination in

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[40] See also Senator Humphrey's statement that "because of the lack of such facilities some truck companies hesitate to use Negro drivers in certain areas of the country" (110 Cong. Rec. 6315 (daily ed.)), and *id.* at 1478 (Congressman Lindsay).

[41] Mr. Roosevelt said that the evidence showed Negroes "use their cars about 40 to 50 percent less than whites do of similar comparable economic levels. I attribute this lower use to the fact that Negroes shy away from taking long trips where they may have, in the case of going from here to Miami, an average of 145 miles between places where they can stop to sleep." *Ibid.*

He also explained that "[s]ome well-to-do [Negro] individuals with enough money for a midwinter vacation, find it far more pleasurable to go abroad than to risk the insults and rejections which they are likely to face in many of the Florida hotels and luxury resorts. In fact, there is a steady stream of such travelers to the British West Indies." *Id.* at 695.

food and lodging "is essential if air commerce is to reach its fullest development." It was the Administrator's "belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations." [42]

The hearings also showed that the selection of sites for conventions and the volume of travel to attend them are strongly affected by the racial practices of hotels and motels. *Senate Commerce Report,* at 17. The Committee noted, for example, that Dallas had greatly benefited because its hotels had integrated, and that "[w]ithin 1 day after 14 Atlanta hotels recently announced they would accept Negro convention guests, the Atlanta Convention Bureau had received commitments from three organizations including 3,000 delegates that would not have otherwise visited Atlanta." *Ibid.* As Congressman McCulloch said, "[p]lanned conventions in many cities are canceled, while others are automatically scheduled elsewhere because of segregation." *Additional Views,* at 12. Under Secretary Roosevelt noted that an American Legion convention of as many as 50,000 persons had been shifted from New Orleans because nonsegregated facilities could not be assured. *Senate Commerce Hearings,* at 696–697.

2. Congress has power to eliminate practices in hotels and motels that burden interstate travel

The factual connection between racial discrimination and interstate travel is sufficient, under the principles

[42] *Senate Commerce Hearings* at 12–13.

already outlined, to establish the power of Congress to require hotels and motels to provide equal accommodations without regard to race or color. Both Congress and this Court have previously recognized, and have dealt with, the harmful effects of racial discrimination upon interstate travel. To facilitate and encourage interstate commerce, Congress has prohibited rail, motor, and air carriers from subjecting "any particular person * * * to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[43] These statutes forbid the carrier to make any distinction among passengers which would inconvenience the transit of any traveler or impose upon him burdens more onerous than are imposed upon other passengers. They require carriers to provide Negro passengers the same facilities and conveniences as are furnished to white travelers. See *Mitchell* v. *United States,* 313 U.S. 80 (Negro passenger denied a Pullman seat); *Henderson* v. *United States,* 339 U.S. 816 (dining car segregation).[44] The prohibition against discrimination is not limited to the physical inconveniences of unequal facilities but extends to the humiliation inflicted by segregation. *Boynton* v. *Virginia,* 364 U.S. 454. Indeed, this Court has held that the burden and inconvenience which racial segregation imposes on interstate travel is so substantial that, even without regard to federal statutes, a State

[43] See 49 U.S.C. 3(1), 316(d) and 1374(b).

[44] Similarly, refusal to provide air carrier space on account of race has been held to violate the Air Carrier Act. *Fitzgerald* v. *Pan American Airways*, 229 F. 2d 499 (C.A. 2).

requirement of segregation on interstate buses is invalid under the commerce clause. *Morgan* v. *Virginia,* 328 U.S. 373.

This power of regulation is not limited to the carriers furnishing the actual transportation across State lines. Interstate travel depends almost as much upon the availability of food and lodging for transients as upon transportation itself. Thus, in *Boynton* v. *Virginia,* 364 U.S. 454, this Court held that the Interstate Commerce Act operated to prohibit segregation in eating facilities in a bus terminal, although the facilities were neither owned nor controlled by the carrier. Recent decisions under the same Act hold that interstate motor carriers may not make use of any terminal in which racial discrimination is practiced. See *Georgia* v. *United States,* 201 F. Supp. 813 (N.D. Ga.), affirmed, 371 U.S. 9; *United States* v. *Lassiter,* 203 F. Supp. 20 (W.D. La.), affirmed, 371 U.S. 10.[45] Indeed, racial segregation in interstate

[45] See also, *United States* v. *City of Shreveport,* 210 F. Supp. 708 (W.D. La.), affirmed, 316 F. 2d 928 (No. 2) (C.A. 5); *United States* v. *City of Jackson,* 318 F. 2d 1 (C.A. 5). This prohibition was pursuant to a regulation of the Interstate Commerce Commission issued in 1961, 49 C.F.R. 180a, 26 Fed. Reg. 9166. See 86 M.C.C. 743. The Commission had earlier decided that rail terminals may not be segregated, *N.A.A.C.P.* v. *St. Louis-San Francisco Ry. Co.,* 297 I.C.C. 335, and the courts, applying 49 U.S.C. 3(1), have enjoined such practices. *United States* v. *City of Jackson, supra; United States* v. *Lassiter, supra.* Similarly, the Federal Aviation Act, 49 U.S.C. 1374(b), has been held to ban air terminal segregation. *City of Shreveport* v. *United States,* 210 F. Supp. 36 (W.D. La.), affirmed, 316 F. 2d 928 (No. 1) (C.A. 5); *United States* v. *City of Montgomery,* 210 F. Supp. 590 (M.D. Ala.).

terminal facilities is thought to interfere with interstate travel so substantially that the commerce clause itself forbids any State law requiring such segregation, under the principle announced in *Morgan* v. *Virginia, supra.* See *United States* v. *City of Jackson, United States* v. *City of Montgomery, United States* v *Lassiter,* and both *Shreveport* cases *supra,* p. 48 and n. 45. See also, *Lewis* v. *Greyhound,* 199 F. Supp. 210, 214 (M.D. Ala.).[46]

The provisions of the Civil Rights Act of 1964 forbidding racial discrimination in hotels and motels which receive transient guests are indistinguishable in purpose and justification from the provisions of the Interstate Commerce Act which this Court has held can be constitutionally applied to terminal facilities. Adequate motel and hotel accommodations are

[46] In light of these decisions it is evident that appellant's reliance upon *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845 (C.A. 4), is misplaced. The court there dismissed a claim based upon refusal of a roadside restaurant to serve a Negro, holding that neither the Interstate Commerce Act nor the commerce clause *standing alone* forbade such a practice. This was merely a holding that the then-existing statutes reached only carriers and terminals and that the commerce clause itself, without Congressional action, did not apply to limit the action of private parties. The court was not called upon to decide, and did not decide, whether Congress had the power to reach such an establishment in the exercise of its commerce power. This is made clear in a subsequent case between the same parties, *Williams* v. *Howard Johnson's Restaurant,* 323 F. 2d 102 (C.A. 4), decided prior to passage of the 1964 Act, where the same Court observed that the enactment of legislation prohibiting discrimination by such a restaurant "might be entirely appropriate for the State or for the Congress. * * *," 323 F. 2d at 106.

no less essential to interstate travelers than adequate restaurants. It has been said that "interstate passengers have to eat" (*Boynton* v. *Virginia*, 364 U.S. at 463); it need hardly be added that they also have to sleep. In *Boynton*, regulation under the commerce power was particularly appropriate because the terminal restaurant "was primarily or partly for the service of the passengers of the Trailways bus" and was "geared to the service of bus companies and their passengers, even though local people who might happen to come into the terminal or its restaurant might also be accommodated" (*id.* at 461, 462). Similarly, hotels and motels are in business largely, if not exclusively, to satisfy the needs of travelers. Seventy-five percent of appellant's patrons are travelers from outside Georgia.

The effect of inadequate transient accommodations upon interstate travel has already been held sufficient to sustain federal regulation of the labor-relations of hotels and motels. Discrimination by an employer against a hotel employee on the basis of union membership can be prohibited by federal law because it may lead to work stoppages at the hotel, and because this in turn (despite the existence of competing hotels) may deter interstate travel. Indeed in *Hotel Employees Local No. 255* v. *Leedom*, 358 U.S. 99 (1958), this Court ruled that the Labor Board could not lawfully follow a general policy of refusing to exercise its jurisdiction over unfair labor practices and other labor disputes in hotels and motels. Since 1958, the Board has repeatedly proceeded against

such establishments despite arguments that it lacked constitutional authority.[47] While the Board's jurisdiction is established if even a small amount of a hotel's purchases are made in interstate channels (see, *e.g., Labor Board* v. *Baker Hotel,* 311 F. 2d 528, 529 (C.A. 5)—on the theory that a labor dispute in a hotel might disrupt the flow of goods in commerce—hotels are also regulated by the Board on the more obvious ground that a labor dispute in a hotel or motel would directly affect interstate travel. Thus in *Labor Board* v. *Holiday Hotel Management Co., Inc.,* 311 F. 2d 380 (C.A. 10), the court of appeals, rejecting a challenge to the agency's authority, stated (p. 381):

> In the case at bar jurisdiction rests on a more firm basis because *the relationship to interstate commerce is direct rather than indirect.* The respondent here received more than $1,500 worth of goods, equipment, and supplies which were shipped directly to it from out-of-State points. While this amount is not impressive, it must be considered together with the obvious fact that "hotels which serve a transient trade play an important role in furthering travel and in fostering commercial relation-

[47] See, *eg., Labor Board* v. *Citizens Hotel Co.,* 313 F. 2d 708 (C.A. 5); *Labor Board* v. *Baker Hotel,* 311 F. 2d 528 (C.A. 5); *Labor Board* v. *Holiday Hotel Management Co., Inc.,* 311 F. 2d 380 (C.A. 10); *Samoff* v. *Hotel, Motel, & Club Employees Union,* 199 F. Supp. 265 (E.D. Pa.); *Sperry* v. *Local Joint Board,* 216 F. Supp. 263 (W.D. Mo.), affirmed, 323 F. 2d 75 (C.A. 8); *Floridan Hotel of Tampa, Inc.,* 124 N.L.R.B. 261; *Atlanta Biltmore Hotel Corp.,* 128 N.L.R.B. 364; *Tulsa Hotel Management Corp.,* 135 N.L.R.B. 968; *Trade Winds Motor Hotel,* 140 N.L.R.B. 567; *Canal St. Hotel,* 127 N.L.R.B. 880; *Lamar Hotel,* 127 N.L.R.B. 885; *Southwest Hotels,* 126 N.L.R.B. 1151.

ships between the inhabitants of the several states."[48] Labor disputes which interfere with the operations of these hotels affect the "operations of the various media of passenger transportation"[49] and if left unchecked would spread to other hotels in the same area with consequent far-reaching harmful effects on interstate commerce.

Similarly, in *Floridan Hotel of Tampa, Inc.*, 124 N.L.R.B. 261, the Board, asserting its jurisdiction, noted that the hotel "provides necessary services to members of the traveling public who travel in interstate commerce," and that "[w]hether the Board has jurisdiction * * * is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board in this case." The "primary function" of the $2,400,000,000 hotel industry being "to furnish lodging facilities * * * and other services to the traveling public," it followed, in the Board's view, that "the operations of the industry facilitate the movement of persons in this country * * *," thus subjecting the hotel to Board regulation. 124 N.L.R.B. at 262–263. To the same effect, see *Atlanta Biltmore Hotel Corp.*, 128 N.L.R.B. 364, 367; *Southwest Hotels, Inc.*, 126 N.L.R.B. 1151, 1154.

The decisions applying the commerce power specifically to hotels and motels amply demonstrate that there is no novelty, from a constitutional standpoint,

[48] Quoting *Southwest Hotels, Inc.*, 126 N.L.R.B. 1151, 1154.
[49] Quoting *Floridan Hotel of Tampa, Inc.*, 124 N.L.R.B. 261.

in the present legislation. The evidence we have summarized is underscored by the "common-sense view that hotels which serve a transient trade play an important role in furthering travel and in fostering commercial relationships between the inhabitants of the several states." *Southwest Hotels, Inc.*, 126 N.L.R.B. 1151, 1154.

3. Congress may constitutionally extend its regulation of hotels and motels to the prohibition of discrimination against all guests whether or not traveling in interstate commerce

It is no objection to the constitutionality of sections 201 (b)(1) and (c)(1) of the Act that they prohibit discrimination by motels against all travelers, whether they be on interstate or intrastate journies. It has long been settled that Congress may regulate intrastate activity where such regulation is necessary to effectuate fully its regulation of interstate commerce. Congress may "choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities," *United States* v. *Darby*, 312 U.S. 100, 121; see, also, *Currin* v. *Wallace*, 306 U.S. 1; *Thornton* v. *United States*, 271 U.S. 414; *Shreveport Rate Cases*, 234 U.S. 342; *Southern Railway Co.* v. *United States*, 222 U.S. 20.

A mere prohibition of the denial of accommodations to Negroes traveling in interstate commerce would not eliminate, even though it might curtail, the burden on interstate travel resulting from racial discrimination. *Senate Commerce Hearings*, at 207. First, such a limited prohibition would subject Negro travelers to the risks and burdens of being required to prove

that they were engaged in an interstate journey.[49a] Interstate travelers do not carry passports; commonly, they lack proof that they are on an interstate trip. Even if some evidence of that fact could be furnished to a motel in one State by travelers from another State, it could rarely be furnished by residents of the State where the motel was located even though they were stopping over on either the beginning or the final leg of an interstate trip. Congress thus had good reason to spare interstate travelers the risk of being unable to prove that they were on an interstate trip and the burden of carrying some form of "passport" which would establish that fact. Compare *Thornton* v. *United States,* 271 U.S. 414; *Currin* v. *Wallace,* 306 U.S. 1.[50]

More fundamental, requiring a Negro to prove that he was travelling in interstate commerce before furnishing equal accommodations would itself be a form of humiliating discrimination, which would burden interstate travel scarcely less than the sort of racial discrimination which the Act seeks to eliminate. Obviously, white travelers would not be required to carry and produce a proof of itinerary. As stated in *Baldwin* v. *Morgan,* 287 F. 2d 750, 759 (C.A. 5), a case involving segregated waiting rooms in a railroad terminal:

> * * * whenever a complaint is received reporting that a Negro is sitting in the "Interstate

[49a] See remarks of Senator Magnuson, Chairman of the Senate Commerce Committee, 110 Cong. Rec. 7177 (daily ed.).

[50] Moreover, the possibility for evasion by hotels which might refuse to accept the traveler's evidence that he was on an interstate trip would alone constitute a sufficient basis for upholding the statute. See *Everard's Breweries* v. *Day,* 265 U.S. 545.

> and white intrastate" waiting room, the police officer is required to, and does, demand to see the tickets to verify the interstate status. As to those in interstate status, this is itself a denial of equal protection by policemen since white interstate travelers are not subjected to like treatment.

The Interstate Commerce Commission, for precisely the same reason, has issued regulations prohibiting a carrier from using terminals or vehicles for interstate purposes if any person (not only interstate travelers) is subjected to segregation or discrimination within such terminals or vehicles. See *Georgia* v. *United States, supra,* p. 48. Finding that "Negro interstate passengers are often required to establish affirmatively, as by producing a ticket, their interstate passenger status to avoid being subjected to racial segregation in the use of terminal facilities, a showing which is not required of white passengers," 86 M.C.C. 743, the Commission ruled (*id.* at 747):

> * * * interstate passengers using such common facilities [may not] be subjected to any inquiry as to whether they are traveling in intrastate or interstate commerce. Such practices would result in discrimination prohibited by section 216(d). It is our view that to enforce the provisions of the act prohibiting unjust discrimination against interstate passengers it is necessary to prohibit the use in interstate operations of any vehicle or facility in which segregation is practiced.

Where it is impractical to separate the interstate from the intrastate transactions, or the attempt

at separation would itself burden interstate commerce, Congress has ample power to regulate both. This familiar principle is also amply illustrated by prior decisions. More than half a century ago, in *Southern Railway Co.* v. *United States,* 222 U.S. 20, the Court upheld the power of Congress to regulate the character of railway cars used in intrastate transportation where it was otherwise impossible to regulate those used in interstate commerce. In *Thornton* v. *United States,* 271 U.S. 414, the Court sustained a statute regulating the conditions under which cattle could be transported locally as well as in interstate commerce. *Currin* v. *Wallace,* 306 U.S. 1, upheld federal regulation of local transactions as well as interstate sales in tobacco markets.

II

TITLE II OF THE CIVIL RIGHTS ACT DOES NOT VIOLATE THE FIFTH AMENDMENT

A. THE PROHIBITION OF RACIAL DISCRIMINATION IN MOTELS DOES NOT DEPRIVE APPELLANT OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW

The Fifth Amendment does not bar congressional regulation of the business of operating a hotel or motel where the means adopted by Congress for fostering and promoting interstate commerce is reasonably adapted to that objective. Appellant has no "right," contrary to its contention, to select its guests as it sees fit, free from governmental regulation. The legislative power to regulate businesses affected with the public interest has been clear since the decision, in 1876, in *Munn* v. *Illinois,* 94 U.S. 113. A public inn

is, of course, one of the most ancient and plainest examples of a business affected with a public interest. The motel is its modern equivalent. Indeed, Mr. Justice Bradley specifically pointed out in the *Civil Rights Cases* themselves that innkeepers "by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them." 109 U.S. 3, 25. He was speaking specifically of racial discrimination.

While the common law duty of innkeepers is enough to answer appellant's claims under the Fifth Amendment, since he cannot set up the rights of others, we also emphasize that the power of Congress and State legislatures to regulate enterprises that affect the public welfare is confined to no fixed category. On the contrary, it is now settled that a State may subject to reasonable regulation all kinds of business and commercial activity. As the Court recently said in *Ferguson* v. *Skrupa*, 372 U.S. 726, 730–731:

> * * * It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, * * *."
>
> * * * We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

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See, also, *West Coast Hotel Co.* v. *Parish,* 300 U.S. 379; *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.,* 335 U.S. 525; *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 488.

The restraints imposed on the national government, in this regard, by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. *Bowles* v. *Willingham,* 321 U.S. 503. See, also, *United States* v. *Darby,* 312 U.S. 100, 125; *United States* v. *Rock-Royal Cooperative,* 307 U.S. 533, 569–570.

There is no reason to suppose that petitioner will suffer economic loss in the long run as a result of the prohibition of racial discrimination but, even if loss ensued, that consequence would not invalidate the statute. "A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciation in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power." *Bowles* v. *Willingham, supra,* at 518.

Nor does the prohibition of racial discrimination in a business which solicits public patronage interfere with personal liberty. The proprietor's relations with his patrons are commercial and casual. The innkeeper has conventionally been subject, since long before the Bill of Rights was adopted, to the common law duty to serve all travellers equally, without regard to personal preference, so long as he can accommodate them. See, *e.g., Lane* v. *Cotton,* 12 Mod. 472, 484 (1701). It will hardly be contended that although

the liberty secured by the Fifth Amendment does not include freedom to discriminate against a traveler upon any other ground, it nevertheless includes freedom to discriminate against Negroes. Were the argument made, the Thirteenth, Fourteenth, and Fifteenth Amendments provide a complete answer.

Here, again, a long line of precedents has rejected the argument presented by appellants and sustains the constitutionality of the legislation. In *Railway Mail Association* v. *Corsi,* 326 U.S. 88, a labor union challenged a New York statute requiring such organizations to admit applicants to membership without discrimination upon grounds or race or color; arguing that the statute was "an interference with [the union's] right of selection to membership and abridgement of its property rights and liberty of contract." This Court upheld the statute. The Court has also sustained, against various constitutional challenges, a District of Columbia regulation prohibiting racial discrimination by restaurants, *District of Columbia* v. *John R. Thompson Co.,* 346 U.S. 100; a Michigan law outlawing racial discrimination by water carriers, *Bob-Lo Excursion Co.* v. *Michigan,* 333 U.S. 28; and a Colorado statute broadly banning racial discrimination in employment, *Continental Airlines* v. *Colorado Anti-Discrimination Commission,* 372 U.S. 714. In the *Thompson* case, the Court had occasion to consider the extent to which Congress had delegated law-making power to the District of Columbia. It concluded that the delegation was "as broad as the police power of a state" and therefore included the power to adopt

"a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia." 346 U.S. at 110.

B. THE PROHIBITION OF RACIAL DISCRIMINATION IN MOTELS DOES NOT TAKE APPELLANT'S PROPERTY WITHOUT JUST COMPENSATION

There is no merit whatever to the claim that the statute amounts to a taking of appellant's property without just compensation. Making the doubtful assumption that appellant will suffer some economic injury as a result of compliance with the law, there is still no "taking" in the sense of the Fifth Amendment. "For consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material * * *. If, under any power, a contract or other property is *taken* for public use, the government is liable; but if injured or destroyed by lawful action, without a taking, the Government is not liable." *Omnia Co.* v. *United States,* 261 U.S. 502, 510. See, also, *Bowles* v. *Willingham,* 321 U.S. 503; *Matveychuk* v. *United States,* 116 Ct. Cl. 859; *Snyder* v. *United States,* 113 Ct. Cl. 61. Thus, in *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, even the closing of a gold mine pursuant to a federal regulatory order was held not to be a taking within the meaning of the Amendment. And see *Jacob Ruppert* v. *Caffey,* 351 U.S. 264; *United States* v. *Darby,* 312 U.S. 100, 125; *German Alliance Ins. Co.* v. *Kansas,* 233 U.S. 389; *Legal Tender Cases,* 12 Wall. 457, 551.

III

TITLE II OF THE CIVIL RIGHTS ACT DOES NOT VIOLATE THE THIRTEENTH AMENDMENT

Appellant's argument that the prohibition of racial discrimination against Negroes subjects it to involuntary servitude can be answered summarily. The Thirteenth Amendment "was adopted with reference to conditions existing since the foundation of our government, and the term 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results." *Butler* v. *Perry*, 240 U.S. 328, 332. No one can seriously contend that requiring a motel proprietor to accommodate Negroes on the basis of equality with guests of other races so long as he chooses to stay in business is a requirement "akin to African slavery."

The laws of thirty States and the District of Columbia prohibit racial discrimination in places of public accommodation.[81] These laws (which would also have to fall upon appellant's theory) codify and extend the common-law innkeeper rule, which of course long predated the ratification of the Thirteenth Amendment.[82] Certainly, appellant cannot believe that the Amendment was intended to abrogate this common-law principle. Mr. Justice Bradley, in the *Civil Rights Cases*, noted with approval that "[i]nnkeepers and public carriers, by the laws of all the

[81] See Appendix C, *infra*, p. 71.

[82] See, *e.g.*, *Lane* v. *Cotton*, 12 Mod. 472, 484 (1701); *Rex* v. *Ivens*, 7 Carr. & Payne 213 (1835).

States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them" (109 U.S. at 25); he suggested, moreover, that if a State discriminatorily failed to enforce this principle in favor of Negroes, Congress would have the power to compel enforcement. *Ibid.*

The promise of the anti-slavery amendments was not merely the abolition of human bondage. The framers were equally determined to remove the widespread disabilities, associated with slavery, that branded the Negro a member of an inferior caste. To argue that these framers, by their very work, placed discrimination in public accommodations wholly beyond the reach of both federal and State law is nothing short of absurd.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

ARCHIBALD COX,
Solicitor General.
BURKE MARSHALL,
Assistant Attorney General.
PHILIP B. HEYMANN,
Assistant to the Solicitor General.
HAROLD H. GREENE,
ALAN G. MARER,
Attorneys.

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APPENDIX A

Title II of the Civil Rights Act of 1964, 78 Stat. 243–246:

TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an appli-

cation for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service

established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further,* That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

APPENDIX B

Statistics furnished Congress by the Department of Commerce to show the average family expenditure for admissions, food eaten away from home, and automobile operations, for 3 income classes, in large northern and southern cities, by race, 1950

[Hearings before the Committee on Commerce, U.S. Senate, 88th Cong., 1st sess., on S. 1732 at 606]

Income class and region	Admissions			Food eaten away from home			Automobile operation		
	Negro	White	Negroes percent of whites	Negro	White	Negroes percent of whites	Negro	White	Negroes percent of whites
$2,000 to $3,000:									
Large northern cities	$31	$29	107	$148	$184	80	$52	$86	60
Large southern cities	$23	$36	64	$113	$194	58	$52	$95	55
Northern expenditures as percent of southern	135	81	.....	131	95	.....	100	91	.....
$3,000 to $4,000:									
Large northern cities	$45	$37	122	$138	$170	81	$67	$158	42
Large southern cities	$37	$39	95	$117	$180	65	$86	$170	51
Northern expenditures as percent of southern	122	95	.....	118	94	.....	78	93	.....
$4,000 to $5,000:									
Large northern cities	$57	$48	119	$182	$234	78	$148	$220	67
Large southern cities	$39	$45	87	$166	$257	65	$136	$225	60
Northern expenditures as percent of southern	146	107	.....	110	91	.....	109	98	.....

Source: "Study of Consumer Expenditure Income and Saving," tabulated by Bureau of Labor Statistics, U.S. Department of Labor, for Wharton School of Finance and Commerce, University of Pennsylvania, Philadelphia, Pa., 1956–57.

APPENDIX C

State public accommodation laws:

Alaska Stats. §§ 11.60.230–11.60.240 (1962); Calif. Civil Code §§ 51–54 (1954); Colo. Rev. Stats. §§ 25–1–1 to 25–2–5 (1953); Conn. Gen. Stats. Ann § 53.35 (1961); Del. Code Ann. tit. 6, ch. 45 (1963); Idaho Code §§ 18–7301 through 18–7303 (1961); Ill. Ann. Stats. (Smith-Hurd ed.) c. 38 §§ 13–1 to 13–4 (1961) c. 43 § 133 (1944); Ind. Stats. Ann. (Burns ed.) §§ 10–901 to 10–914 (1961); Iowa Code Ann. §§ 735.1–735.2 (1950); Kan. Gen. Stats. Ann. § 21–2424 (Supp. 1962); Maine Rev. Stats. C. 137 § 50 (1954); Md. Ann. Code § 49 B § 11 (1964); Mass. Ann. Laws C. 140 §§ 5 & 8 (1957), c. 272 §§ 92A, 9B (1963); Mich. Stats. Ann. §§ 28.343 and 28.344 (1962); Minn. Stats. Ann. § 327.09 (1947); Mont. Rev. Codes tit. 64 § 211 (1962); Neb. Rev. Stats. C. 20 §§ 101 & 102 (1954); N.H. Rev. Stats. Ann. C. 354 §§ 1, 2, 4 & 5 (1963); N.J. Stats. Ann. tit. 10 §§ 1–2 to 1–7; tit. 18 §§ 25–1 to 25.6 (1963); N.M. Stats. Ann. §§ 49–8–1 to 49–8–6 (1963); N.Y. Civil Rights Law (McKinney's ed.) Art. 4 §§ 40, 41 (1964); Exec. Law Art. 15 § 2901 (1964); Penal Law Art. 46 §§ 513–515 (1944); No. Dak. Cent. Code § 12–22–30 (1963); Ohio Rev. Code (Page's ed.) §§ 2901–35 and 2901–36 (1954); Oreg. Rev. Stats. §§ 30–670, 30–675, 30–680; (1963) Pen. Stats. Ann. title 18 § 4654 (1963); Rhode Island Gen. Laws §§ 11–24–1 to 11–24–6 (1956); So. Dak. Sess. Laws C. 58 (1963); Vt. Stats. Ann. title 13 §§ 1451, 1452 (1958); Wash. Rev. Code Ann. §§ 49.60.010 to 49.60–170, 9.91.010 (1962); Wisc. Stats. Ann. § 942–04 (1958); Wyo. Stats. Ann. § 6–83.1, 6–83.2 (1963); District of Columbia Code, title 47 §§ 2907, 2910 and 2911 (1961).

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